

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

AK TUBE, LLC

and

Case No. 8-CA-34830

HERBERT HARRIS, an Individual

AK TUBE, LLC

and

Case No. 8-CA-34831

JON PAUL BISSONNETTE, an Individual

Nichole Hoover Cook, Esq., for the
General Counsel.
Kerry P. Hastings, Esq., of Cincinnati,
Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. These cases were tried in Toledo, Ohio, on August 4 and 10, 2004, based on separate charges filed on February 11, 2004, by Herbert Harris and Jon Paul Bissonnette (jointly, the Charging Parties) against AK Tube, LLC (the Respondent).

The Regional Director's consolidated complaint, dated April 30, 2004, alleges that the Respondent violated Section 8(a)(1) of the Act by denying requests by the Charging Parties during October and December 2003¹ for the presence of a union representative during investigatory interviews. The Respondent denies that the Charging Parties made such requests, asserts that the Charging Parties did not have an objectively reasonable belief that their interviews could lead to discipline, and maintains that the Charging Parties waived any rights to representation by "knowingly proceeding with their interviews." The Respondent further contends that the complaint allegations should have been deferred to the contractual grievance procedure, where ongoing grievances are being pursued that assertedly involve the same issues presented in the complaint.

¹ Unless otherwise indicated, all dates reference 2003.

The following issues are, thus, presented in this litigation: whether the charges should be deferred; whether either or both of the Charging Parties requested the presence of a union representative and, if so, whether the Respondent denied such requests; and whether either or both of the Charging Parties had a reasonable expectation of discipline.

At the trial, the parties were afforded a full opportunity to examine and cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file post-trial briefs. Based on the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and oral argument of the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. Jurisdiction

The Respondent, a Delaware corporation, maintains an office and place of business in Walbridge, Ohio, where it has been engaged in the business of welding steel tubing, and from where it annually sells and ships good valued in excess of \$50,000 directly to points located outside the State of Ohio.² I find, and it is admitted, that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

I find, and it is admitted, that United Steelworkers of America, Local 1915 (the Union) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

The Union, granted recognition in 1999 through a card check process, is party to a collective-bargaining agreement with the Respondent in effect from January 24, 2000, to January 29, 2006.³ The Charging Parties, Harris and Bissonnette, were long-term employees working in the Respondent's shipping department. Both worked on the third shift from 11 p.m. to 7 a.m., and neither held any position with the Union.

The parties stipulated, and I find, as follows: that the Respondent utilized the services of investigators Mike Mullins and Arthur Marx; that in October, Mullins and Marx interviewed Harris and Bissonnette in an office on the Respondent's premises "for the purpose of investigating the possibility that [the Respondent's] steel tubing was being misappropriated"; that in December,

² These jurisdictional facts are pleaded in the complaint, and admitted in the answer.

³ Art. 6 of the collective-bargaining agreement provides for a grievance procedure culminating in arbitration. Sec. 1 of art. 6 provides as follows: "Any dispute or controversy between the Employer and any employee covered by the Agreement concerning the application or interpretation of this Agreement or the application of shop rules shall be a grievance" Sec. 3c provides as follows: "The arbitrator shall have no authority or jurisdiction to add to, detract from, or alter the terms and conditions of this Agreement. The decision of the arbitrator shall be final and binding on both parties to this Agreement." The agreement contains no provision dealing with *Weingarten* rights, 420 U.S. 251 (1975).

Mullins and Marx again interviewed Harris in an office on the Respondent's premises for the same purpose; that Mullins and Marx "were agents of [the Respondent] within the meaning of Section 2(13) of the [Act] with respect to the conduct of [these] interviews"; and that in January 2004, the Respondent discharged Harris and Bissonnette "based on information uncovered in the investigation into the possibility that [the Respondent's] steel tubing was being misappropriated." The parties further agreed that "[t]he General Counsel does not allege that the decisions to discharge the Charging Parties violated the National Labor Relations Act and does not seek the reinstatement or back pay for either Charging Party."

On August 18, the Respondent hired Douglas Murphy as the shipping department manager, replacing Chris Beyer who had held the position for 6 to 7 years. Beyer was demoted to shipping department supervisor.⁴ Shortly after assuming his job, Murphy became aware of a "cannot find file," which detailed tubing product not available to ship to customers, or missing tubing. At the regularly scheduled quarterly employee meetings held for each shift in late September, the Respondent's vice president, Murray Rose, announced to employees that the Respondent was missing about \$100,000 of its tubing inventory, that it didn't know whether this was computer error or some other problem, but that the Respondent was going to launch an investigation to determine what happened. At the time of, and following these meetings, rumors spread among the Respondent's employees concerning the investigation.

Harris heard rumors from fellow employees to the effect that there was a problem with the Respondent's inventory, and that it was investigating missing tubing. Bissonnette heard similar rumors from Supervisors Chris Beyer and Darren Newman. Union Bargaining Unit Chairman Donald Blanchong testified that during this period, Supervisor Newman told him that the Respondent had detectives looking into the missing tubing and that Newman had heard that the Respondent had installed video cameras overlooking the shipping docks.

During this time period, the Respondent contracted with Unique Investigative Services (Unique) to investigate the missing tubing. In conducting the investigation, Unique utilized the services of its owner, Mike Mullins, involved in investigatory and law enforcement work for about 30 years including serving as a full-time patrol officer and a part-time chief of police, and Unique's employee Arthur Marx, a retired Toledo police officer who had spent 31 years working in law enforcement, including 17 years working in homicide, with his last 2 years working in internal affairs for the Toledo police.

After the Respondent retained the services of Unique, Murphy advised Unique owner Mullins that if an interviewee requested a union representative, one was to be supplied. Murphy so instructed Mullins orally prior to each interview as part of a series of instructions, and also at the outset of the interviews provided a handwritten set of instructions to Mullins which included the following: "if Herb [Harris] request union Rep supply as a witness."⁵ Harris was specifically mentioned in the instructions because he was the first to be interviewed, but these instructions were repeatedly given by Murphy to Mullins, and Murphy told the investigators: "I did not want any of these deviated from, that this was the guidelines for interviewing." Mullins discussed

⁴ At the time of the demotion, Beyer held a meeting with shipping department employees, at which he told employees that he was being replaced by Murphy because he was too lenient, and that things were now going to be more strict and by the book.

⁵ As is detailed herein, no union representative appeared at the interviews of Harris and Bissonnette. There is no allegation here, therefore, that the role of any union representative was overly restricted. See, for example, the discussion relative to restricting the union representative to the role of a silent observer in *Barnard College*, 340 NLRB No. 106 (2003).

these guidelines with Marx. In response to these instructions, Mullins specifically told Marx that the subjects of the interviews belonged to a union and they had the right to union representation if they requested it. All told, the investigators interviewed 12 to 14 of the Respondent's employees, and performed a total of about 14 to 18 interviews of these employees. The complaint alleges *Weingarten* violations as to three of these interviews, involving the two Charging Parties.

As noted, it is undisputed that Harris was interviewed by Unique's private detectives once in October and once in December, that Bissonnette was interviewed once in October, and that the interviews were "held for the purpose of investigating the possibility that [the Respondent's] steel tubing was being misappropriated." The complaint allegations involve these three interviews, whether either or both of the Charging Parties requested union representation, whether the Respondent or its agents denied any such requests, and whether the Charging Parties were entitled to union representation at the interviews. As further noted above, the Respondent eventually discharged both Harris and Bissonnette, but the discharges were not alleged as violations nor litigated here, and are the subject of ongoing grievances.

A. The October Interview of Harris

Near the end of the third shift on October 29, shipping department front line supervisor, Terry Timpe, asked Harris to accompany him to Murphy's office,⁶ telling Harris that he was to accompany Timpe to Murphy's office, to "see a couple of guys who need to talk to you." Harris asked, "[A]bout what?", and Timpe responded that he didn't know. Harris testified that he said to Timpe, "[W]ell, am I going to need a union rep?" According to Harris, Timpe responded, "No, they just want to ask you some questions." Harris said, "All right." Timpe testified that, in fact, Harris did not say anything about a union representative during the conversation. Timpe escorted Harris to Murphy's office, and departed.⁷ Present in the office were investigators Marx and Mullins, and Murphy.⁸ Murphy exited, and Unique investigators Mullins and Marx then interviewed Harris, in Murphy's office, for about 2-½ hours.

At the outset of the interview, Marx introduced himself and Mullins to Harris, showed identification to Harris, and told him that they were there to assist the Respondent in locating missing tubing. The interview proceeded with Marx asking Harris general background questions about his employment and his work duties. At some point Marx asked Harris about the removal of steel tubing from the plant. Harris admitted that he and others, including Bissonnette, had removed tubing from the plant and that Bissonnette had helped Harris "haul steel tubing away

⁶ Murphy's office is located in the front business office area of the building, rather than the shipping department. In the past, Harris had been called to this office several times to receive discipline.

⁷ I credit Timpe, not Harris. Harris's extensive testimony in the hearing was characterized by hesitancy and inconsistency. While it would appear that Harris has little to gain in the instant hearing as the sought remedy only provides for a notice posting, there could be a substantial impact on his grievance/arbitration proceeding and the remedy sought therein. In contrast to Harris, Timpe testified in a straightforward manner, did not appear argumentative, and answered questions in a generally forthright, unhesitating manner, without seeming to weigh the impact or import of each answer.

⁸ Harris testified that Murphy was not present. Timpe, Murphy, Mullins, and Marx testified that Murphy was present when Harris arrived at the office, then left. For reasons discussed *infra*, I generally do not credit Harris when his testimony is in conflict with Mullins, and particularly Marx, and specifically do not credit Harris here.

from AK Tube because [Harris] didn't have a truck." Harris further admitted to the investigators that he had traded "scrap tubing for work on [his] car," but denied that he had traded the tubing for work on the cars of others.

5 In his testimony at the hearing, Harris denied that the Respondent had any "policy" as to scrap tubing, but told the investigators that he had obtained "scrap passes" from supervisors, and offered to bring previously obtained scrap passes to the investigators. Harris testified as follows as to the scrap passes: "If they say you can have it, then you go to the office. We keep
10 them in—in the shipping office, we keep them in a steel—steel bin, you get it out, go over to the bundle, whatever you want, document the length, type material, how many sticks, how many it is, and the description of what's wrong with it, and let the supervisor sign it, and you can get it to where—when you wanted." The interview then ended to enable Harris to travel home, retrieve the scrap passes, and present them to the investigators. About 30 minutes later, Harris presented about four or five scrap passes to the investigators.

15 According to Harris, during the course of the interview he noticed Mullins taking notes as Harris was answering questions, and asked Mullins, "Am I a suspect or something? Do I need a union rep or attorney here, or something, because, you know, what's this all about?" On direct examination, Harris testified that Mullins responded, "Well, we're investigating some stolen
20 material and a few stolen objects." Harris testified that he then said, "Oh, no, I don't know nothing about—you know, I don't know what you're talking about."

Upon being questioned by me as to this interview, Harris added to his initial testimony on direct examination that when he asked the investigators whether he needed a union
25 representative or attorney, Marx ("the older guy") said, "No, this is just an investigation." Upon being further questioned as to why he asked whether he "needed" a union representative rather than just asking for a union representative, Harris initially responded, "Well, for one, I didn't feel I had nothing to hide, and I didn't—you know—, the—I—." Mullins and Marx flatly denied that Harris mentioned union representation or an attorney during the interview.

30 Upon careful consideration of their testimonial demeanor, context of the testimony, consistency of answers, possible motivation, and other factors, I conclude that in areas where Harris's sworn testimony conflicts with that of Marx and/or Mullins, the testimony of Marx and Mullins is fully credited. In making this assessment, I note that Mullins, and particularly Marx,
35 have spent a lifetime in law enforcement. Marx spent years working in the Toledo police homicide department and in the internal affairs department, while Mullins worked in law enforcement as a patrol officer and a chief of police. I further note that neither Marx nor Mullins are employed by the Respondent, and under the circumstances of this case, neither would have any significant incentive to be less than truthful. Further, as noted above, I found Harris to be
40 occasionally hesitant in his answers, as if contemplating the import or impact of potential answers, and prone to add to or change his testimony upon being given a second or third chance.

45 Following the interview with the investigators, Harris had a brief conversation with the Union's chief officer, Unit Chair Donald Blanchong. Harris testified that he told Blanchong about the interview and that Blanchong asked Harris if he was represented, to which Harris responded to Blanchong: "I say, I asked Terry Timpe did I need a representative; he said, no, you don't need none. I went in there and I asked the two detectives, I said, hey, do I need a rep—do I
50 need a union rep or an attorney, because you all make me feel like I'm a suspect. They say, no. I said, okay, well, I went on with the meeting." Blanchong, however, testified that when he asked Harris why he had no union representative during the interview, Harris said that Timpe told him "that he didn't need anybody in there." Despite extensive questioning on direct and

cross, and by me, as to this conversation, Blanchong did not testify that Harris said anything about asking Mullins or Marx for a union representative, or that Mullins or Marx denied such request. This major inconsistency between the testimony of Harris and Blanchong further convinces me that Mullins and Marx testified truthfully, that Harris did not request the presence of a union representative during the interview.

Shortly after Harris and Blanchong spoke, Blanchong spoke to Bruce Weinberg, the Respondent's director of human resources. Blanchong asked Weinberg why there was no union steward present during the Harris interview. Weinberg turned to Harris and asked if he had requested one. Harris responded, "I didn't know I needed one." Weinberg turned back to Blanchong and said, "He didn't ask for one." Harris said, "I didn't know who I was talking to, I thought they might be the police." Blanchong said, "That's bull****, there should be a union steward in there." Weinberg reiterated that Harris had not asked for one.⁹ At some point in the conversation, Blanchong told Weinberg that Harris told Blanchong he had asked Timpe if he needed a union steward.

Bissonnette testified that Harris called him¹⁰ later that day, and told Bissonnette that Harris was being investigated by the "private detectives," "and they asked him a bunch of questions about the missing tubing . . . and—and he didn't have a—he had asked for a union rep and they didn't give it to him, and—and I said, well, we didn't do anything wrong, we had scrap passes for everything so, you know, it's no big deal, I didn't think so." On direct examination, Harris testified that he spoke to Bissonnette "face-to face" and "I told him what went down, you know, I told him what happened." Upon further questioning by counsel for the General Counsel, Harris added, "I said—they asked me a lot of questions, I—I asked them for a union rep, Terry Timpe told me I didn't need one. The two—well, the one older guy told me I didn't need one." On cross-examination, Harris testified that he couldn't recall whether he had spoken to Bissonnette after the interview.

B. The Interview of Bissonnette

Later on October 29, Supervisor Chris Beyer approached Bissonnette about an hour into his shift. Beyer told Bissonnette that "two detectives want to talk to you." Beyer escorted Bissonnette to Murphy's office.¹¹ According to Bissonnette, when he arrived at Murphy's office

⁹ I find this conversation took place as testified to by Weinberg. Blanchong testified that the conversation took place as follows: that Blanchong asked Weinberg why Harris was denied representation; that Weinberg responded, "No, I specifically told those guys that if they wanted representation, to let them have it"; that Blanchong turned to Harris and asked if he was allowed representation; that Harris said, "no"; that Weinberg said, "No, no, I don't think that's the case, but if it was, I'll reiterate to the guys that if they ask for it, they're to give it to them"; and that Harris then left to obtain his scrap passes and Blanchong told Weinberg that "it was bull**** that Weinberg always has stewards present for discipline but never for the investigation." Harris testified that Blanchong told Weinberg that "that's bull****, why he didn't have representation in there?", and that "him [Blanchong] and Bruce [Weinberg] [were] standing there arguing." While I find both Blanchong and Weinberg to be generally reliable witnesses, here Weinberg testified confidently and consistently with excellent recall, even upon being repeatedly asked about this conversation on direct and cross-examination. Harris's testimony, somewhat detailed in other respects, lacked detail as to this conversation.

¹⁰ However, Bissonnette did not testify that he had a "face-to-face" conversation with Harris.

¹¹ Bissonnette testified that he never had been escorted to Murphy's office before, that when he was told to go to that area previously, on three occasions, he had been paged over the

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he saw Murphy and two other men in the office. Murphy introduced the two men (Marx and Mullins) as private investigators. Bissonnette testified, "And I said, well, don't you think I should have a union rep here, and I—I was looking at Doug Murphy, and he said, no, you don't need one. Then I looked at Chris Beyer, and he said, no, just go and talk to them. And then I looked
 5 at the two private investigators, and one of them said, I don't know which one, I forget which one said it, but he said, we just want—no, we just want to talk to you."

Beyer, Murphy, Mullins, and Marx all testified that Bissonnette did not ask about a union representative. Beyer testified that the only conversation he had with Bissonnette, as they were
 10 walking to Murphy's office, consisted of Beyer telling Bissonnette that "I knew there was an investigation going on, and that's all I was able to tell him." According to Beyer, when they arrived at Murphy's office Murphy and the two investigators were already there, there was no discussion, and Beyer simply dropped Bissonnette at the door to the office, and left. Beyer testified he heard Bissonnette say nothing about a union representative. Murphy testified that
 15 there was no mention of union representation while he was present. Mullins and Marx both testified that at no time during the interview did Bissonnette ask for, or talk about, a union representative.¹²

During the interview, the investigators asked Bissonnette about whether Harris had
 20 spoken to him about his interview, about whether he was involved in hauling the tubing for Harris, about how much tubing was involved and where it was hauled to, and about whether Harris took money for the tubing. Bissonnette admitted that he had hauled tubing for Harris, that he had asked Supervisor Beyer if that was "okay" and was told it was, and that Harris didn't take money for the tubing but "you know his car would be loud in the parking lot, I'd hear it, and
 25 then I'd haul tubing for him to the muffler shop, and then like a day or so later his car would be quiet."

Like Harris, Bissonnette claimed he obtained scrap passes for all the tubing. Bissonnette described one occasion he took tubing as follows: "One of the guys at the exhaust
 30 place said they wanted to make a tree stand for hunting, and—and you needed some. And I had a scrap pass for that, too. I had—I had to cut it up. I don't remember who signed that scrap pass." When Bissonnette told the investigators that he heard they had television cameras trained on the muffler shops, they told him that wasn't true. Bissonnette responded, "[W]ell, that's too bad because, you know . . . you would have seen me at the muffler shop sitting there
 35 all morning waiting for my truck to get fixed because, you know, they was worried about me

public address system, and that on the three prior occasions he had received discipline from the Respondent, each time in one of the front offices, the area where Murphy's office was located.

¹² I do not credit Bissonnette when his testimony is in conflict with Marx, Mullins, Murphy,
 40 Beyer, or Blanchong. I reach this determination upon careful consideration of his testimonial demeanor, context of his testimony, and consistency of answers. Bissonnette was hesitant in answering certain questions, and appeared to frequently be considering the impact of his possible answers before completing his answers to questions. As to motivation, while
 45 Bissonnette, seemingly, has little to gain as the remedy herein would likely consist of posting a notice and a cease-and-desist order, I note that the Union, in pursuit of his discharge grievance, has raised the *Weingarten* issue and, thus, a finding of a violation herein could have a substantial impact on the outcome of any resulting arbitration. Contrariwise, both Marx and Mullins, with extensive law enforcement backgrounds, were eminently credible witnesses who,
 50 generally, testified in a forthright and consistent manner. Further, neither are, or were, employees of the Respondent, and neither appear to have any overt reason to be less than truthful.

taking money and I didn't, and you would've seen me sitting there, you know, waiting for my truck to get fixed." At one point Bissonnette asked the investigators if the interview was being tape recorded, "because, you know, he was saying how he wanted me to tell, . . . he wanted me to rat people out, you know . . . and I'm going there's no union rep here, is—is it being taped recorded, and he said no." When asked on direct examination why he proceeded with the interview without a union representative, Bissonnette testified, "I didn't think I did any wrong, . . . and then I thought, you know, I might get fired for not going and talking to them."

The day after the interview, Bissonnette called Blanchong and described to him what occurred during the interview and that he did not have a union representative. During the conversation, Blanchong asked Bissonnette if Harris hadn't mentioned to him "to ask for representation and not to go in there by yourself." Bissonnette responded, "Yes, but I didn't think I needed one."¹³ Blanchong also testified that he is sure that during the conversation Bissonnette told him that he had asked for a union representative.

A few days after the interview, Bissonnette complained to Murphy about being singled out for investigation. Murphy responded that the Respondent would follow all of the leads. Bissonnette, however, did not complain to Murphy during their conversation about the absence of a union representative during the interview.

A. The December¹⁴ Interview of Harris

Harris was again interviewed by investigators Marx and Mullins in December. This time Supervisor Chris Beyer escorted Harris to Murphy's office. Initially, Beyer approached Harris and told him that the detectives were back; "[y]ou've got to go, and they just want to go over what you—what was said." Harris responded, "Red [Chris], what are you telling these guys?" Beyer responded, "They just want to go over [what was said in the first interview]." Harris responded, "Chris, you know I need a union rep." Beyer said again that the investigators just wanted to go over what Harris said in the first interview. Harris responded, "Okay," and did not further discuss a union representative.¹⁵ Beyer departed after escorting Harris to the office.

¹³ I credit this version of the Bissonnette/Blanchong phone conversation, which Blanchong admitted was true on cross-examination, and which originally was set forth in an affidavit which Blanchong gave during the course of the investigation. Bissonnette testified that he told Blanchong that "they wouldn't give me a union rep," and that when Blanchong seemed upset with this explanation, Bissonnette added, "I thought that I'd get fired if, you know, I didn't go and talk to them, you know, and I didn't have anything—I didn't think I did anything wrong." On direct examination Blanchong testified that he couldn't remember whether Bissonnette told him he asked for a union representative before or during the interview but that Bissonnette told him that "he stopped the—interview and told them that he felt he needed representation . . . and the detectives told him that they didn't work for AK Tube so, therefore, he wasn't entitled to one." Bissonnette did not mention this alleged response from the detectives during his testimony, and both Marx and Mullins deny the subject of the union came up.

¹⁴ The parties stipulated that the second Harris interview occurred in December, but there is no evidence as to the exact date on which the interview occurred.

¹⁵ Here, Harris testified to different versions of this conversation with Beyer. I credited the first version that Harris testified to when asked initially on direct examination by counsel for the General Counsel. When asked a second time about this conversation, Harris added that Beyer responded to Harris's comment about a union representative, "No, you don't . . ." This addition of potentially crucial testimony upon being given a second chance is consistent with my appraisal of Harris as a generally unreliable witness. Yet, I do credit his initial version of this

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At the inception of the interview, Marx told Harris that he wanted to make sure that the report Marx had prepared from Harris's first interview was accurate, and that there were some additional questions the investigators wanted to ask him. Harris agreed to this. Marx reviewed with Harris the report of the first interview, and then disclosed to Harris the report Marx had completed of his interview with a muffler shop owner. Harris commented that the muffler shop owner was "lying." Finally, Marx reviewed with Harris the report Marx had prepared of the Bissonnette interview. Harris told Marx that he had not called Bissonnette, as allegedly claimed by Bissonnette in the interview. At some point Harris said, "Let's quit," and the interview, which lasted about two hours, ended. Harris testified that during the interview he asked the investigators whether he "needed" a union representative, and that he subsequently told Blanchong that he had made such a request. I do not credit this testimony.¹⁶

As noted, the Respondent discharged both Bissonnette and Harris in January 2004, based on information obtained in the investigation. Both filed grievances challenging their discharges, and in the course of the grievance procedure the Union has raised the issue of whether union representation was provided to Harris and Bissonnette during the interviews described above. No other evidence was adduced as to the grievances. There have been no past grievances filed which asserted *Weingarten* rights as a violation of the agreement.¹⁷

conversational. Thus, in the context of his conversation with Union Official Blanchong after the October interview, it is logical that Harris would have said something about a union representative upon being approached by a supervisor to participate in a second interview. Further, while the Respondent called Beyer as a witness, and asked detailed questions about escorting Bissonnette to his interview and any conversation which occurred, Beyer was not questioned as to this conversation with Harris. Inasmuch as Beyer would be expected to testify favorably for the Respondent, I infer that if he had been asked about the conversation with Harris, he would not have denied Harris's version. *Grimmway Farms*, 314 NLRB 73, fn. 2 (1994).

¹⁶ I have concluded that the version of this interview set forth in the decision, as testified to by both investigators, Marx and Mullins, is accurate. For reasons set forth in the decision, I have largely discounted the testimony of Harris. Here, Harris testified that at the beginning of the interview, when the investigators told Harris they wanted to go over what he said during the first interview, Harris said, "I need a union rep, don't I?" According to Harris, Marx responded, "No, no, no, no, no, you don't need one. We just want to make sure and give you a chance to change anything or just tell us what you know." Marx and Mullins, both credible witnesses with little apparent motivation to be less than truthful, consistently testified that Harris neither mentioned, nor asked for, a union representative at any time during the interview. Harris testified that after the interview he spoke to Blanchong and told Blanchong that he had been interviewed again, that he had asked Chris and the investigators for a union representative, that they had said "no" to the request, and that he had proceeded with the interview anyway. Blanchong denied he had any such conversation with Harris after the December interview. Between Harris and Blanchong, I credit Blanchong as I do not find Harris to be a generally credible witness. Further, Blanchong has no illegitimate motive to contradict Harris.

¹⁷ On cross-examination Weinberg was asked: "Has there been any prior grievance regarding *Weingarten* rights?" Weinberg answered: "No."

Analysis and Conclusions

A. Deferral¹⁸

5 The Respondent contends the complaint allegations should be deferred to the contractual grievance procedure, citing the following factors: Harris and Bissonnette were discharged based upon information uncovered in the investigation; the collective-bargaining agreement provides for binding arbitration; Harris and Bissonnette filed grievances challenging the discharges under the “just cause” provision contained in the agreement; and the Union has raised the issue of whether Harris and Bissonnette were denied union representation during the investigation as part of the challenge to the discharges. Counsel for the General Counsel in arguing against deferral, points to the grievance jurisdiction provision of the collective bargaining agreement (art. 6, sec. 1), which limits grievances to “[a]ny dispute or controversy between the Employer and any employee covered by the agreement concerning the application or interpretation of the contract or the application or interpretation of shop rules.” Counsel for the General Counsel further posits that since there is nothing in the collective-bargaining agreement which deals with *Weingarten* rights, and there is no history of processing *Weingarten* rights grievances under the agreement, there is no basis upon which to defer the *Weingarten* allegations in the complaint.

20 In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board overruled *General American Transportation Corp.*, 228 NLRB 808 (1977), and returned to the more expansive deferral standards of *Collyer Insulated Wire*, 192 NLRB 837 (1971). The Board noted its limited resources and its policy of encouraging parties to resolve disputes through collectively bargained mechanisms, and set forth six major factors underlying its deferral policy as follows: “The dispute arose within the confines of a long and productive collective bargaining relationship; there was no claim of employer animosity to the employees’ exercise of protected rights; the parties’ contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration.” *United Technologies Corp.*, supra at 558 fn. 113.

35 The Respondent, in its brief, maintains that in the instant case all of the factors set forth by the Board favor deferral, and cites *Postal Service*, 275 NLRB 430 (1985), as analogous (albeit post-arbitration), and in which the Board deferred to the arbitration decision. Counsel for the General Counsel argues only that the contractual arbitration clause does not clearly encompass the dispute at issue, and cites *Barnard College*, 340 NLRB No. 106 (2003), where a *Weingarten* violation was not deferred to the grievance procedure.¹⁹

40 In *Blue Cross Blue Shield*, 286 NLRB 564 (1987), a case not involving the assertion of *Weingarten* rights, the Board rejected deferral to arbitration, and viewed the key question as being whether the alleged violation was a grievance cognizable under the collective-bargaining agreement. In *Blue Cross*, supra, as in the instant case, there was no contractual language

¹⁸ Whether deferral is appropriate is a threshold issue and must be decided in the negative before the merits of the dispute are reached. *E. I. du Pont & Co.*, 293 NLRB 896 fn. 2 (1989).

¹⁹ While counsel for the General Counsel’s brief cites this decision at fn. 5, the footnote in the Board’s decision deals with unrelated matters. However, fn. 5 of the administrative law judge’s decision is on point.

specifically dealing with the subject matter of the alleged violation, and the arbitrator was limited, by contract, to the application or interpretation of the agreement.²⁰

Further, in *Blue Cross*, supra, as in the instant case, the Respondent cited *Postal Service*, supra, in support of its deferral argument. The Board rejected the argument, found *Postal Service* in analogous, and specifically pointed out that in *Postal Service* the parties had agreed that the subject matter of the dispute came within the scope of the binding grievance-arbitration procedure.²¹ Here, the contract contains no language even arguably dealing with *Weingarten* rights, there is no evidence of collective-bargaining history to demonstrate to the contrary, and no past grievance has ever been pursued alleging that the contract has been violated in respect to *Weingarten* rights. The grievances, here, are being pursued under the just cause provision of the agreement. They are not being pursued under a provision dealing with *Weingarten* rights, because there is none.

In addition to the *Barnard College*, supra, decision cited by the counsel for the General Counsel in her brief, there are other Board decisions involving the issue of deferral of *Weingarten* violations, where the contract does not speak to *Weingarten* rights. For example in *Amoco Oil Co.*, 278 NLRB 1 (1986), a decision affirmed by the Board, the judge declined to defer a *Weingarten* allegation to the grievance procedure finding that such rights inhered in the Act, not in the contract. See also *Potter Electric Signal Co.*, 237 NLRB 1289 (1978).²² In *Consolidated Edison Co. of New York*, 323 NLRB 910 (1997), a decision affirmed by the Board, the judge declined to defer a *Weingarten* allegation to the grievance procedure, finding as follows: "Nor is there any ground for deferral to the parties' grievance and arbitration procedures. Respondent has introduced no evidence that such a *Weingarten* violation is cognizable under the parties' collective-bargaining agreement or even under their past practice in light of that agreement. To the contrary . . . the contract contains no provisions concerning employees' *Weingarten* rights."

This is not to say that the Board hasn't deferred to the grievance procedure under certain circumstances, even without specific contractual language dealing with the alleged unfair labor practices. For example, in *Clarkson Industries*, 312 NLRB 349 (1993), the Board deferred a subcontracting allegation where the union had filed a grievance over that specific issue, thereby demonstrating that both parties considered the issue covered by the contractual grievance-arbitration procedure. In *E.I. du Pont & Co.*, 293 NLRB 896 (1989), the Board deferred a work assignment allegation where the union had previously taken a similar dispute to arbitration under the collective-bargaining agreement, thereby indicating that both the union and employer considered such disputes to be subject to the contractual grievance procedure. In the

²⁰ In the instant case, the scope of the grievance/arbitration provision, also reached "shop rules," a distinction without a difference here.

²¹ "In fact, the parties stipulated before the arbitrator that the question of whether the Respondent had violated the Act was properly before him." *Postal Service*, supra at 432. There is no evidence of a similar stipulation or agreement in the instant matter. The only evidence pertaining to this issue is the credited testimony of Weinberg that in the discharge grievance process, the Union has "raised the issue whether union representation was provided to these employees during the investigation." There is no further context, and no evidence as to what position the Respondent has taken, if any, in the grievance procedure as to any *Weingarten* issue. Thus, while the Respondent urges deferral here, there is no evidence that it has ceded *Weingarten* jurisdiction to the arbitrator.

²² There, however, the judge cited *General American Transportation Corp.*, 228 NLRB 808 (1977). Thus, I do not rely on this case for precedent.

instant case, however, there have been no previous grievances or arbitrations on a *Weingarten* issue, and the specific grievance filed by the Union, and relied on by the Respondent in its deferral argument, deals with just cause discharge, not *Weingarten*.

5 The absence of a specific or even arguable contract provision as to *Weingarten* rights, the lack of any history of such grievances under the contractual language, the contractual language limiting grievances to contractual or work rules disputes, the lack of a grievance here which specifically sets forth a *Weingarten* allegation, and the purely statutory and noncontractual essence of the issue here, lead me to conclude that the instant allegations are not appropriate for deferral. I have also taken into consideration that the nature of the grievances here, whether the discharges were for just cause, might lend themselves to remedies appropriate to a discharge case (i.e., reinstatement, conversion to a suspension, and backpay), remedies not sought nor appropriate for the allegations contained in the complaint, but would not be likely to produce the type of remedy the Board imposes in *Weingarten* situations (i.e., posting a notice, cease and desist).²³

B. Merits

20 The Supreme Court, in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), held that the right to union representation inheres in Section 7's guarantee of the right of employees to act in concert for mutual aid and protection, that the right arises only in situations where the employee requests representation, and that the employee's right to request representation as a condition to participation in the interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. The reasonable belief criteria is an objective standard, and the question is whether an employee reasonably believed that discipline would result from the interview. *Southwestern Bell Telephone Co.*, 338 NLRB No. 67 (2002).

30 Once an employee makes a valid request for union representation, the employer is permitted one of three options: grant the request; dispense with or discontinue the interview; or offer the employee the choice of continuing the interview unaccompanied by a union representative, or of having no interview at all, thereby foregoing any benefit that the interview might have conferred on the employee. *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984).

35 Here, I have found that neither Bissonnette nor Harris requested the presence of a union representative during their respective October interviews, and that Harris did not request that the investigators provide a union representative during the course of his December interview with the Unique investigators. However, I further concluded that when Supervisor Beyer approached Harris in December to escort Harris to the interview, Harris said to Beyer, "Chris [Beyer], you know I need a union rep." In her brief, counsel for the General Counsel argues that the Respondent's failure to provide a union representative in response to Harris's comment to Beyer violated Harris's Section 7 rights. The Respondent, in its brief, maintains, "Beyer did not interview Harris and could not violate his *Weingarten* rights." Thus, the Respondent argues that

45 ²³ Whether arbitration will lead to a remedy that is the equivalent of a Board remedy for the allegations if proven, is an issue considered by the Board in its decision as to whether to defer to arbitration. See, for example, the Board's discussion in *Clarkson Industries*, supra at 351. Even though the language limiting the arbitrator's authority in the instant case is not as broad as in *Clarkson*, it is unlikely that an arbitrator's decision on "just cause" will produce the functional equivalent of a Board remedy for a *Weingarten* violation.

inasmuch as Beyer did not perform the interview, any failure by the Respondent to honor a request made to Beyer did not violate Harris's Section 7 rights.

I conclude, as maintained by counsel for the General Counsel, that once Harris commented to Beyer as to needing a union representative, his *Weingarten* rights ripened,²⁴ and the Respondent's choices were limited to the three *Weingarten* options: grant the request; dispense with the interview; or offer Harris the choice of continuing the interview unaccompanied by a union representative, or of having no interview at all.²⁵ Clearly, Harris's comment to Beyer was sufficient to put the Respondent on notice of his desire for representation. See, for example, *Montgomery Ward & Co.*, supra, where the Board concluded that even an employee's request for the presence of a supervisor was sufficient to put the employer on notice.²⁶

I further conclude that Harris reasonably believed the investigation could result in discipline.²⁷ Thus, as I have found above, rumors were rife among employees and supervision that the Respondent was utilizing private detectives to investigate missing inventory, the interview was to be conducted in an office which had been the setting of previous discipline received by Harris, a prior supervisor had been demoted and had informed Harris and other employees that he had not been strict enough, the Respondent had already announced the investigation, and Harris had already undergone his first interview, and had been advised by

²⁴ The Respondent, in its brief, cites *Lennox Industries*, 244 NLRB 607 (1979), enfd. 637 F.2d 340 (5th Cir. 1981), in support of its argument that Harris's *Weingarten* rights would only ripen if Harris made the request to the detectives, which I have concluded he did not. The facts in *Lennox* are, however, distinguishable, and the holding, therefore, inapposite. In *Lennox*, in the circumstances where the Board did not find a violation, the employee was told to report for an interview with a supervisor of the employer. Here, Harris was told to report for an interview by private detectives, who were not employed by the Respondent. Harris made a request for representation directly to the only supervisor he dealt with, Beyer. Under these circumstances, the Respondent was clearly put on notice that Harris desired the presence of a union representative during his interview with the detectives. Further, in *Lennox*, the Board found crucial that the manager, to whom the request for representation was made, knew nothing about the reason the employee had been requested to report for an interview by a lower supervisor. Here, Beyer knew that the interviews were part of the Respondent's ongoing investigation.

²⁵ See *Roadway Express, Inc.*, 246 NLRB 1127, 1128 (1979), where the Board concluded that the employee's *Weingarten* rights ripened at the moment he requested union representation when approached on the plant floor by a supervisor and was requested to accompany the supervisor to an office for an interview: ". . . an employee may make a request for union representation while on the plant floor, and need not repeat the request at the office if the official there is aware of such request . . ." [C]iting *Chrysler Corp., Hamtramck Assembly Plant*, 241 NLRB 1050 (1979)] Here, the supervisor who summoned Harris to the interview, and to whom the request was directed, accompanied Harris to the office where the interview was to take place. While there is no evidence that the Unique investigators who conducted the interview were made aware of Harris's request, the making of the request is not obviated, and the burden on the Respondent is not lessened, because the Respondent's supervisor chose not to either provide a representative or inform Unique's investigators of Harris's request.

²⁶ See also *New Jersey Bell Telephone Co.*, 300 NLRB 42 fn. 3 (1990), enfd. 936 F.2d 144 (3d Cir. 1991).

²⁷ Although I have not found that Bissonnette requested a union representative, I conclude, for the same reasons set forth as to Harris, that Bissonnette had reasonable grounds to believe that his interview could lead to discipline.

Blanchong that he should request a union representative. Under these circumstances, it is objectively reasonable for an employee to believe discipline could result from the interview. See, for example, *Consolidated Edison Co. of New York*, 323 NLRB 910 (1997). I, thus, conclude that when the investigators undertook the December interview of Harris, without the Respondent exercising or presenting Harris with the required *Weingarten* options, the Respondent violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, Local 1915, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. About December 2003,²⁸ the Respondent interfered with, restrained, and coerced employees in the exercise of Section 7 rights, thereby violating Section 8(a)(1), by denying the request of its employee Herbert Harris to be represented at an investigatory interview that the employee reasonably believed might result in disciplinary action.

4. The complaint allegations that the Respondent violated Section 7 in October 2003, by denying the requests of employees Herbert Harris and Jon Paul Bissonnette to be represented at investigatory interviews, have not been supported by substantial evidence.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²⁹

ORDER

The complaint allegations that the Respondent violated Section 8(a)(1) in October 2003, by denying the requests of employees Herbert Harris and Jon Paul Bissonnette to be represented during investigatory interviews shall be dismissed.

The Respondent, AK Tube, LLC, Walbridge, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring that employees participate in interviews or meetings when the employees have reasonable grounds to believe that the matters to be discussed may result in their being disciplined and where representation at those interviews or meetings has been denied.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

²⁸ The exact date being unknown.

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall, as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5 (a) Within 14 days after service by the Region, post at its facilities in Walbridge
(Toledo), Ohio, copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on
forms provided by the Regional Director for Region 8, after being signed by the Respondent's
authorized representative, shall be posted by the Respondent immediately upon receipt and
maintained for 60 consecutive days in conspicuous places including all places where notices to
10 employees are customarily posted. Reasonable steps shall be taken by the Respondent to
ensure that the notices are not altered, defaced, or covered by any other materials. In the event
that, during the pendency of these proceedings, the Respondent has gone out of business or
closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its
own expense, copies of the notice to all employees and former employees of the Respondent at
any time since February 11, 2004.

15 (b) Within 21 days after service by the Region, file with the Regional Director a sworn
certification of a responsible official on a form provided by the Region attesting to the steps that
the Respondent has taken to comply.

20 Dated, Washington, D.C., December 17, 2004

25 _____
Mark D. Rubin
Administrative Law Judge

30 If this Order is enforced by a judgment of a United States court of appeals, the words in
the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted
50 Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the
National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT require that employees participate in interviews or meetings when the employees have reasonable grounds to believe that the matters to be discussed may result in their being disciplined and where representation at those interviews or meetings has been denied.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

AK TUBE, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695, Cleveland, OH 44199-2086
(216) 522-3716, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer, (216) 522-3740.